In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-975

ARTHUR MICHAEL NEWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 468 F. 2d 791.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1972, and a petition for rehearing was denied on December 20, 1972. The petition for a writ of certiorari was filed on January 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the conviction for willfully attempting to evade income tax liability.

2. Whether petitioner's privilege against self-incrimination was violated by application of the expenditures method of proving income tax evasion, where petitioner claimed that the funds he spent during the years 1967 through 1970 came from a cash hoard he accumulated before 1960 in his career as a thief.

3. Whether the trial court erred in receiving in evidence a statement made by petitioner in a prison admission summary, against the objection that it constituted hearsay.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> Sec. 7201. Attempt to Evade or Defeat Tax.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> Sec. 7203. Willful Failure To File Return, Supply Information, Or Pay Tax.
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> Any person required * * * to make a return * * * who willfully fails to * * * make such return, * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT

Petitioner was tried in the United States District Court for the Southern District of Florida on an eight-count indictment. The first four counts charged willful attempts to evade and defeat income tax liability for the years 1967 through 1970 by failing to file returns, by failing to pay the tax, and by "concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income," in violation of Section 7201 of the Internal Revenue Code of 1954. The last four counts charged willful failure to file income tax returns for the years 1967 through 1970, although knowing that they were required by law to be filed, in violation of Section 7203 of the Code. After a jury trial, petitioner was acquitted on Counts I and V, relating to the year 1967, and was convicted on all six of the remaining counts, relating to the years 1968 through 1970. The evidence to support the verdict may be summarized as follows:

Petitioner filed no income tax returns for the years 1967 through 1970 (Tr. 13).[1] The proof showed that, during the four years in question, petitioner made substantial expenditures of funds, totalling about $63,000 (Tr. 199). The Treasury agent assigned to petitioner's case developed evidence pertaining to these expenditures (Tr. 181) and conducted an investigation as to whether the funds arose from taxable or nontaxable sources (Tr. 182). In making this investigation, the agent searched public records in four counties; contacted financial institutions in four countries, including 277 banking institutions, securi-

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[1]The designation "Tr." refers to the typewritten transcript of proceedings at the trial.

ties brokers, investment houses, savings and loan associations, real estate and mortgage companies and mutual fund dealers; checked petitioner's Social Security transcript; had a mail cover placed on petitioner's home for several months; checked records of the Internal Revenue Service; and interviewed petitioner (Tr. 184-187, 225-226).

When interviewed by the Treasury agent on November 9, 1970, in the presence of his attorney, petitioner stated that he had not filed income tax returns for the years 1967 through 1969; that he knew the filing requirements; that he had last filed prior to 1963; that he did not have gross income of $600 or more during any year between 1966 and 1969; that he had received no gifts, inheritances or loans during those years; that, however, he had bought automobiles on the installment plan during those years; that he bought some cars and securities in his wife's name, of which he was the owner; that all of his expenditures during the years 1967 through 1969 came from undeposited cash on hand, which he had stolen prior to 1960; and that he had been a professional thief but had retired upon his release from prison in October 1966 and was not now active (Tr. 189-192).

In 1965, when interviewed in prison, petitioner claimed that he had no personal assets, but stated that he expected his parents would send him money while he was incarcerated. He also stated late in 1965 that he was financially unable to take further legal action in his own behalf (Tr. 144). The admissibility of this item of evidence is challenged by petitioner.

James Prigodich, a lieutenant on the Hollywood, Florida, police force, testified that he was acquainted with petitioner and that in October 1968 petitioner had told him, during the course of a conversation at a bar, that "You

poor slobs that have to work for a living are crazy. I make $100,000 a year tax-free without working" (Tr. 84-86, 88). Lieutenant Prigodich testified further that, upon hearing this remark, a detective named Keller told petitioner, "If you work in our city, I'll put a hole through you," and that petitioner replied, "I don't work in your city. I stay out of Hollywood" (Tr. 89).

ARGUMENT

1. There is no merit in any of petitioner's various attacks (Pet. 10-23) on the sufficiency of the proof. The expenditures method of proving income is nothing more than a simple variation of the net worth–expenditures method discussed at length in *Holland* v. *United States*, 348 U.S. 121. In the typical net worth case, the emphasis is on net worth increases; in an expenditures case, the emphasis is on money spent during the year, usually on things other than investments in assets. If an exhaustive investigation discloses that none of the funds applied to current expenditures have been realized from nontaxable sources (except for amounts duly credited), there is a solid, substantial basis for a jury's inference that the taxpayer has received taxable income. And if that taxable income year after year substantially exceeds income reported on the tax returns (in this case returns were never filed), the jury may infer that there has been a willful attempt to evade the tax. *Smith* v. *United States*, 348 U.S. 147, 157. This inference is particularly strong in a case like the one at bar, where petitioner made false statements to the investigating agents as to his income, conducted substantial business dealings in currency, and owned certain assets in his wife's name.

Turning now to petitioner's specific complaints, his contention (Pet. 10-17) that the proof failed to establish

the affirmative act of evasion (as distinguished from mere acts of omission such as failure to file returns) required by *Spies* v. *United States,* 317 U.S. 492, 499, should be rejected. It is unnecessary to consider whether petitioner's large dealings in currency (Tr. 61, 77, 199) or his purchases of assets in his wife's name (Tr. 192) constitute sufficient acts of concealment to satisfy the requirements of *Spies,* because here we have patently false statements to the investigating agents by petitioner. On November 9, 1970, in the presence of his attorney, petitioner told the agents that he did not have gross income of $600 or more during any year between 1966 and 1969, and that all of his expenditures during those years came from undeposited cash on hand which he had stolen prior to 1960 (Tr. 190-191). The evidence proved these statements to be false. Such false statements, taken together with all the other evidence in the case, clearly constitute violations of the tax evasion statute (Section 7201 of the 1954 Code). See *United States* v. *Beacon Brass Co.,* 344 U.S. 43 (involving the predecessor statute under the 1939 Code).

The argument (Pet. 18-20) that the convictions for the years 1969 and 1970 must fall because of the testimony regarding petitioner's statement that he was making $100,000 a year in 1968 is frivolous. If the jury had accepted petitioner's boastful statement regarding the $100,000 (Tr. 88) at face value, it might have had a reasonable doubt as to whether the expenditures for 1969 and 1970 arose from current taxable income; but the fact that they returned verdicts of guilty as to those counts shows that they had no such doubts. Surely they were not required to accept every word petitioner said as gospel truth.

There is no substance to the contention (Pet. 20-23) that the proof failed to negate possible sources of nontaxable income and to establish a likely source of taxable income. To begin with, it is not necessary for the government to prove both. It may prove either a likely source of taxable income (*Holland* v. *United States*, 348 U.S. 121, 138), or that the expenditures did not arise from nontaxable sources (*United States* v. *Massei*, 355 U.S. 595). In the case at bar, however, the government did both. From petitioner's conversation in October 1968 with Lieutenant Prigodich and from the proof that petitioner was consistently making large expenditures though he had no visible means of support, the jury could readily infer that by 1968 petitioner was back at his old trade of theft and burglary. As for negating nontaxable sources of income, we have detailed in our statement, *supra*, the great pains the agents took to investigate fully the possibility of such nontaxable receipts (they in fact gave petitioner credit in their computations for all such items discovered (Tr. 203, 220-222)). Moreover, petitioner admitted to the agents, in the presence of his attorney, that he had received no gifts or inheritances during the years 1966 through 1969 and had not borrowed any money from relatives or friends (Tr. 191).

As for the possibility that the expenditures during the prosecution years might have come from a hoard of undeposited cash from thefts committed prior to 1960 (when he was less than 21 years old),[2] this is sufficiently negated by (1) petitioner's 1968 conversation with Prigodich and Keller, which tended to show that he was still engaged in illegal activities; (2) petitioner's admissions in prison in 1965 that he had no personal assets

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[2]Petitioner was born in 1939 (Tr. 280-281).

but expected his parents would send him some money while he was incarcerated and that he was financially unable to take further legal action in his own behalf (Tr. 144); (3) the fact that, even after an exhaustive investigation, the Treasury agents could find no assets held by petitioner as of January 1, 1967, except an automobile (Tr. 183); and (4) the fact that in 1967 and 1968 petitioner was buying automobiles on the installment plan (Tr. 44; Govt. Exs. 77,79).

2. Petitioner next argues (Pet. 24-27) that application of the expenditures method to his case violated his privilege against self-incrimination because he could not give details of his pre-1960 thefts (which, he claimed, resulted in a large cash hoard which was spent during the prosecution years) without incriminating himself under state law. This contention is without merit for the reasons stated in detail by the court below (Pet. App. 7-8) and for the further reason (which alone is enough to dispose of the point) that since these alleged crimes were all committed at least ten years before petitioner's conversation with the agents, the applicable statute of limitations had long since barred prosecution for them, and petitioner therefore would not have risked self-incrimination. In Florida, all offenses not punishable by death must be prosecuted within two years of the commission of the offense. 24 Fla. Stat. Ann. 932.05.

3. Equally without merit is the contention (Pet. 27-31) that the trial court erred in receiving into evidence Govt. Exhibit 73, a prison admission summary. In the first place, any error in this regard would be harmless because the bit of evidence referred to was only a small part of the Government's "starting point" proof. Moreover, the exhibit was properly admitted. Official records, which are admissible in evidence under 28 U.S.C. 1733, are a well

recognized exception to the hearsay rule, and the use of such evidence does not violate the right to confront adverse witnesses. *Tomlin* v. *Beto*, 377 F. 2d 276, 277 (C.A. 5). Since the prison record in question plainly qualified as an official record, it was properly admitted despite the fact that the information was not obtained personally by the government witness who prepared the report.

Petitioner's reliance on *Yaich* v. *United States*, 283 F. 2d 613, 616 (C.A. 9), is misplaced. Since the conviction in that case was affirmed, the portion of the opinion relied upon by petitioner is only dictum. Moreover, the court cites as its authority the case of *Olender* v. *United States*, 210 F. 2d 795 (C.A. 9), where the correct rule is stated, *viz.*, that "the facts stated in the document must have been within the personal knowledge and observation of the recording official *or his subordinates*, and that reports based upon general investigations and upon information gleaned second hand from random sources must be excluded." *Id.* at 801 (emphasis added). Accord: *La Porte* v. *United States*, 300 F. 2d 878, 882 (C.A. 9); 5 Wigmore, *Evidence*, § 1635(2). Petitioner's objections to this evidence properly go to its weight rather than to its admissibility.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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